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TÍTULO: Protección legal de la vida y la salud de un niño: problemas interprofesionales.

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RESUMEN: El estudio actual consideró los problemas de protección legal de la vida y la salud de un niño antes y después del nacimiento, analizó la legislación rusa y extranjera, se propuso consolidar los principios fundamentales del derecho internacional en la legislación de la Federación de Rusia, y se proporcionó la protección del embrión humano. Teniendo en cuenta la experiencia extranjera y los avances en la ciencia médica, los abogados rusos presentaron propuestas para proteger la vida y la salud de las personas antes del nacimiento y durante el desarrollo fetal, a las que se les recomendó establecer legalmente la responsabilidad por los daños a la salud o la muerte de un embrión humano.

PALABRAS CLAVES: Beneficios humanos inherentes, la vida y la salud de un niño, embriones humanos, reparación de daños, responsabilidad extracontractual.

TITLE: Legal protection of life and health of a child: interbranch problems.

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ABSTRACT: The current study considered the problems of legal protection of a child's life and health before and after birth, analyzed Russian and foreign legislation, it was proposed to consolidate the fundamental principles of international law in the legislation of Russian Federation, and it was provided the human embryo protection. Considering the foreign experience, and advances in medical science, Russian lawyers provided proposals to protect human life and health before birth and during fetal development, which were advised to legally establish responsibility for damage to health or death of a human embryo.

KEY WORDS: inherent human benefits, life and health of a child, human embryo, reparation of harm, tort liability.

INTRODUCTION.

Life and health are the inalienable benefits of a person, which have the highest and constitutional value all over world. International legal acts proclaim everyone's right to life, and the obligation to establish living standard that is necessary to maintain human health and ensure in the illness, disability or loss of livelihood due to circumstances which are beyond his control.

Constitution of the Russian Federation (Art. 2) proclaims a person, his rights, and freedoms as the highest value; thus, recognizes life and health.

According to definition of the Constitutional Court of the Russian Federation, "... human health is the highest inalienable blessing, without which many other benefits and values will lose their worthiness ...", Constitution of the Russian Federation proclaims the right of life (Article 20) and the right of health protection (Article 41), protection of citizens' life and health is the duty of the state (Article 2 of Constitution of the Russian Federation).

In the provisions' development of Constitution of the Russian Federation, relevant legislative acts have been adopted to protect the citizens' life and health, with the goal of not allowing derogation of these constitutionally significant goods, and providing for state protection in the event of infringement upon them.

The legislator defines life and health of a person as intangible benefits which belong to a citizen from birth, inalienable from him and non-transferable in a different way (clause 1 of article 150 of the Civil Code of the Russian Federation).

The concept of health is contained in Charter of the World Health Organization (in its preamble), according to which health is a state of complete physical, mental, and social well-being, and not just the absence of disease and physical defects. A similar definition is given in Article 2 of the Federal Law of 21.11.2011 No. 323-ФЗ "based on the protection of public health in the Russian Federation".

DEVELOPMENT.

In legal literature, the existence of the body as an object of the material world is usually understood as a person's life, and the normal, biologically safe, and physiological state of the human body is considered as health (Erdelevsky, 2004).

The meaningful definitions of life and health are developed and researched in the special sciences framework (biology and medicine). The law uses these definitions both directly, by drafting legislation that contains norms on protection of life and health, and indirectly, by involving experts in the field of medicine and biology in court cases on protection of life and health.

Life as a process has its beginning and end moments. The moment of life beginning is a legal fact that gives rise to a whole system of legal relations to protect the constitutionally significant value of life, and is the moment of legal capacity, and moment of the end of life is a legal fact that terminates legal capacity, and with it many legal relations in which the citizen participated.

Medicine distinguishes two periods of individual human development:

- 1) intrauterine, starting from the beginning moment of fertilization of the egg.
- 2) extrauterine; so, medical data clearly reflect the real beginning of a person's being as the moment of fertilization.

It is from the point that human body begins to develop, and the clear boundary between being and non-being passes. Accepted embryologists' ideas shows that very first cell of a human embryo - a zygote - is unique and contains all the information about person characteristics such as gender, height, hair color, facial features, protein structure, blood type, and abilities (Konovalova, 1998).

It is important to note, that medical definition of the beginning of life is reflected differently in the laws of various states. This problem has caused serious legal discussions for a long time.

Methodology.

General scientific cognition methods were used in this study that includes comparison, abstraction, analysis, synthesis, induction and deduction, ascent from the abstract to the concrete, as well as special methods of comparative-legal, regulatory-logical, technical-legal, system-structural, complex research, sociological, linguistic, and others in their diverse combination.

Results and Discussion.

Russian and most foreign countries legislation protect human rights from the moment of birth. However, in the world's law, there are tendencies to protect the child's rights already at the stage of the embryo. So, Art. 157 of the Criminal Code of Spain of 1995, provides for criminal liability to inflict damage or injury to the fetus, which led to serious damage to its development or caused a serious physical or mental disability.

The 1997 Polish Criminal Code identifies abortion as a crime when the fetus has achieved the capacity for independent life outside mother's body. Israeli Civil Delict Legislation recognizes that victims not only a born child, but also a human embryo (Art. 2 of the Order of Compensation for Harm).

The constitutions of Ireland, Slovakia, and the Czech Republic recognize the right to a person's life before his birth; that is, from the moment of conception. In connection with transformation of the Health Code, the French legislature in January 2000 proclaimed that life of a human being should be protected from the first moments and signs of its manifestation (Saint-Rose, 2003).

Courts of Great Britain are also concerned about problem of the position of embryo and are striving to give the status of a person. Evidence shows the tendency to establish responsibility which harm embryo. English law is provided for special qualifications when the victim is a child and has not yet been born or is not one year old when he committed the crime (Léger, 2010). In 1972, Scottish Road Accidents Act (Road Traffic Act 1972), the embryo is recognized as a legal person.

In Australia, there is the principle that embryo has the right to claim for compensation for damage caused by negligence during its prenatal growth.

Since 1975, the US Congress legally established boundaries of status of the life to which all human rights apply, and recognized the status of a new life and personality for a fertilized egg (Sukhikh and Repin, 2000).

The American convention on human rights, adopted by Inter-American Conference on Human Rights on November 22, 1969 in San José and entered into force on July 18, 1978, establishes that law protected life from the moment of conception (Section 1, Article 4). Code of Tort Law of the US establishes that when a person harm to an unborn child, this is liable to him if the child born alive.

In March 2004, the US Senate adopted the Law on Unborn Victims of Violence, according to which if a pregnant woman committed a crime, it has effects on both the mother and her unborn child. It is recognized that embryo or fetus is subject for the protection of federal legislation and like any US citizen has rights.

In Russia, there are also well-founded opinions about the need for legal protection of human life and health even before his birth (Budyakova, 2005; Zaitseva, 2009; Zolotykh, 2008). So, M. I. Kleandrova shows that a person goes through two main stages in his development: from the first moment of the birth, and from birth to death; having this point in mind, a person at both stages of his development should be given certain rights (Kleandrov, 1999).

Some deputies proposed to amend the civil legislation of Russian Federation and to establish the emergence of the legal capacity of a citizen not from the moment of birth, as preserved in Art.17 of Civil Code of Russian Federation but from the moment of its conception.

CONCLUSIONS.

Disadvantage of Russian civil law is its lack of special designed rules to protect property and non-property rights of the two categories of victims, parents, and the children themselves, who were harmed before and during the birth (in particular, damage to the health of the pregnant woman and the fetus as a result of unlawful actions, due to medical errors in provision of medical services to the mother and child during perinatal period, and etc.), which entail additional expenses for treatment, costs for maintenance, care, and adaptation.

The international legal acts ratified by Russia provide legal basis for filling the indicated gap in Russian legislation. Thus, declaration of rights of the child, which adopted by the UN General Assembly, proclaims that “the child, due to his physical and mental immaturity, needs special protection and care, including adequate legal protection, both before and after birth”.

The provisions indicated that declaration is also contained in preamble of the UN Convention on Rights of the Child. Art. 12 of the International Covenant on Economic, Social and Cultural Rights considered that to implement right of every person to the highest level of physical and mental health, necessary measures should be taken to ensure reduction of stillbirth and infant mortality, and healthy growth of a child should be performed.

It can be seen, that there are some contradictions between norms of international legal documents and Russian legislation. Paragraph 4 of Art. 15 of Constitution of Russian Federation generally recognized that principles and norms of international law and international treaties of the Russian Federation are an integral part of its legal system.

If an international treaty of the Russian Federation establishes rules other than those provided by law, then rules of the international treaty shall apply. Thus, since the above international documents have been ratified by our state, the norms contained in them are of priority, and they are subject to application, and Russian legislation must be brought in line with international legal norms.

It seems that Russian legislator must take into account foreign experience, advances in medical science, and the proposals of Russian lawyers and provide them to protect human life and health before birth; that is, during its intrauterine development. In particular, the civil legislation of Russian Federation should provide the liability for damage to health or death of a human embryo.

However, now, in a situation which harm the life or health of the child before his birth, he must be reimbursed and compensated according to the rules of Ch. 59 of the Civil Code of Russian Federation, on the basis of the considered international legal norms that are an integral part of the Russian legal system, and also based on these benefits - their inseparability from man and natural occurrence (they are not granted by state, but the state recognizes and is obligated to protect).

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